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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-357

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, et al.,

Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE STATES OF NORTH CAROLINA AND UTAH, AMICI CURIAE, IN SUPPORT OF APPELLANTS

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Pursuant to Rule 36 of the Rules of this Court, the States of North Carolina and Utah, by their undersigned Attorneys General, respectfully submit this brief as amici curiae in support of appellants.

INTEREST OF THE AMICI

This appeal presents the question of whether state highway taxes that, in their purpose or actual operation, fall more heavily on trucks registered outside the taxing state than on trucks registered in the state discriminate against interstate commerce in violation of the Commerce Clause. The taxes at issue -- Pennsylvania's $36-per-axle tax and former $25-per-truck marker fee -- have just such a discriminatory purpose and effect. The same constitutional infirmity infects Arkansas' annual $175-per truck highway use equalization ("HUE") tax, the subject of a related appeal -- American Trucking Associations, Inc. v. Gray, 55 U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-358)).

Motor carriers registered in the amici States of North Carolina and Utah

are subject to the Pennsylvania taxes and therefore suffer directly from the discrimination those taxes cause. That discrimination results in increased costs, reduced productivity, and a competitive disadvantage for those carriers. An interstate trucking industry handicapped by discrimination cannot provide the competitive, efficient trucking service necessary to both deliver to and transport products from the amici states and cannot make the contribution to the states' economy, in terms of jobs and salaries, that it otherwise could. Additionally, a disability imposed on a state's interstate trucking industry has a ripple effect throughout the state's entire economy because all interstate businesses rely on trucking to secure delivery of raw materials and to transport finished goods to market. Consequently, the amici states have a direct and substantial

interest in this appeal.

STATEMENT

A. The Importance of Interstate Trucking to States' Economies.

The interstate trucking industry plays a central role in the economy of the amici States of North Carolina and Utah. The interstate trucking industry serves every community in these states, and a majority of the communities depend entirely on trucks to ship and receive goods (e.g., in North Carolina, 72% of its communities depend entirely on trucking (Rand McNally & Company, 1983 Commercial Atlas & Marketing Guide, 432-438)). Equally important is the fact that every type of industry in the amici states relies on trucking to obtain raw materials and to transport their products to market (e. g., approximately 70% of all of North Carolina's manufactured products are transported by truck (U.S.

Department of Commerce, 1977 Census of Transportation, Commodity Transportation, Table 1, p. 6)). Additionally, hundreds of thousands of individuals are employed in North Carolina and Utah in trucking-related jobs, which provide annually billions of dollars in salaries.

The interstate trucking industry is an essential component of the amici states' economies. All types of business and industry in the states rely on trucking for transportation services, and the thousands of jobs provided by the trucking industry are vital to each states' economic well-being.

B. State Taxation of Interstate Trucking.

North Carolina and Utah, like the large majority of states, impose a two-tiered highway tax system to raise the funds necessary to build and maintain their highways. The first tier are annual registration fees, graduated

according to weight. Registration fees are applied by the amici states to trucks registered in other states either on a mileage prorated basis under the International Registration Plan ("IRP") or are waived pursuant to reciprocity agreements. Under the IRP, a state charges a foreign truck only a percentage of its usual registration fee, based on the ratio of the truck's total miles nationwide to its miles in the taxing state. Under reciprocity agreements, a state permits trucks that have paid full registration fees to another state to use its highways in exchange for the other state's authorizing trucks registered in the initial state to use its highways. Pursuant to both the IRP and reciprocity arrangements, interstate truckers do not suffer with respect to registration fees the discriminatory burdens they suffer with respect to the challenged Pennsylvania taxes and similar

non-proportioned taxes levied by other states.

The second tier of highway taxes are fuel purchase and use taxes. North Carolina and Utah tax all fuel purchased or used within their bounds. These fuel taxes are directly related to mileage, in that the more miles a truck operates in a state, the more fuel it consumes and the more tax it pays. Additionally, because a heavier vehicle consumes more fuel per mile of operation than a lighter vehicle, fuel taxes necessarily recover a higher tax from heavier trucks to compensate for any additional highway wear and tear caused by the weight of the truck.

The amici states have found their two-tiered highway tax systems provide a reasonable, cost-effective, easily administered way to assess highway taxes based upon a fair approximation of use. Registration fees are intrinsically related to weight and thereby provide a

ready mechanism to recoup highway costs in a manner sensitive to both a truck's weight and its level of usage. Likewise, as discussed, fuel taxes, which annually raise more revenue from trucks than do registration fees ($163 million compared to $81 million in North Carolina in 1985 (U.S. Department of Transportation, Highway Statistics 1985, Tables MV2, MF1, and MF2)), are also sensitive to a truck's weight and level of usage.

SUMMARY OF ARGUMENT

Interstate motor carriers are subjected to two forms of discrimination by the challenged Pennsylvania taxes. First, simultaneous with the imposition of the $36-per axle tax, the Pennsylvania legislature reduced the registration fees of in-state trucks in amounts equal to the tax. The axle tax was thus structured to relieve Pennsylvania

carriers from the financial impact of the tax. It thereby inflicts "structural discrimination" on interstate commerce in violation of the Commerce Clause.

Second, both the axle tax and the $25-per-truck marker fee impose an "effective" discrimination in their actual operation. Because of the non-proportional measure of these taxes, in-state trucks can take advantage of their far more extensive in-state mileage in order to reduce their per-mile tax cost well below that of trucks registered in other states, which make sporadic and far less frequent use of Pennsylvania's highways. Trucks based in the amici States of North Carolina and Utah thus are subjected to a discriminatorily higher per-mile effective tax rate on their Pennsylvania operations, which is not related in any manner to the level of state services provided.

The higher cost per mile imposed on

the amici states' motor carriers places them at a substantial disadvantage in competing with trucks based in a state levying a discriminatory tax. The disadvantage attendant to these non-proportional discriminatory taxes has multiplied as that form of taxation has spread to six other states, including Arkansas (see American Trucking Associations, Inc. v. Gray, No. 86-358 supra). It has also worsened as the level of the flat taxes has risen from the flat $25 marker fee enacted by Pennsylvania in 1980 to a $150-$200 flat tax imposed by Kentucky for the first time in 1987. The spread of these taxes has resulted in a crippling cumulative tax burden totally unrelated to interstate carriers' use of the nation's highways.

The imposition of these discriminatory forms of highway taxation is totally unnecessary since non-

discriminatory forms of highway taxation are readily available to the discriminating states. Amici North Carolina and Utah successfully rely on a two-tiered non-discriminatory system of taxation, including fuel taxes, which is based on a fair approximation of use. Their favorable experience with such taxes stands as clear evidence that non-discriminatory and far less burdensome alternatives are available.

ARGUMENT

A. The Structural Discrimination Resulting From the Imposition of the Axle Tax Cannot Be Justified as a Rational Restructuring of Pennsylvania's Highway Tax Burdens.

The statute enacting the $36-per-axle tax, while facially imposing the tax on all motor carriers, relieved Pennsylvania-registered carriers from the financial impact of the tax by simul-

taneously reducing Pennsylvania registration fees by amounts equal to the axle tax. The Pennsylvania Supreme Court recognized that the intent of the legislature in structuring the axle tax in this manner was to "lessen the burden imposed upon 'local commerce'" (J.S. App. 31a). The court, however, approved the legislative manipulation as a "rational restructuring" of the state's highway tax system, undertaken to offset an economic advantage purportedly enjoyed by interstate commerce.

That supposed economic advantage resulted from the duty of Pennsylvania-registered trucks to pay the state's registration fee, which the court determined was not imposed upon trucks registered in other states. This determination, however, is completely in error. It misapprehends the nature of the registration fee, and ignores out-of-state trucks' payment, either

directly or indirectly, of Pennsylvania's registration fee. Out-of-state trucks under the IRP directly pay Pennsylvania a prorated share of the state's registration fee (supra at 6), and out-of-state trucks under reciprocity indirectly contribute to the Pennsylvania registration fee program. See American Trucking Associations, Inc. v. Quinn, 437 A.2d 623, 627 (Me. 1981) (reciprocity held to represent an indirect contribution by foreign based trucks to the treasury of Maine because the reciprocity agreement allowed Maine to collect more from its in-state based trucks than it otherwise could have).

In sum, since out-of-state trucks are already subject to Pennsylvania registration fees, as well as to registration fees in their own home states, those fees cannot be viewed as offsetting the structural discrimination inherent in the axle tax legislation.

The Pennsylvania legislature was not engaging in a rational restructuring of highway tax liabilities but was instead plainly and deliberately shielding locally based carriers from the financial impact of the tax.

B. Pennsylvania's Axle Tax and Marker Fee Discriminate Against Interstate Commerce in Their Actual Operation Because They Are Not Proportioned to the Level of Highway Use.

1. The Higher Cost Per Mile Imposed on Amici's and Other States' Truckers Puts Them at a Substantial Competitive Disadvantage.

The Pennsylvania axle tax and marker fee, as well as the Arkansas HUE tax and all other non-proportional state highway taxes, work an effective discrimination against interstate commerce in their actual operation. Though facially applicable to all trucks, nonproportional taxes in practice disadvantage out-of-state trucks because the measure of the

taxes is not based on the level of highway use. In-state trucks generally utilize their own state's highways much more than out-of-state trucks. By imposing the same tax for much higher usage levels, states exact a much lower per-mile tax from locally-based trucks than from their out-of-state counterparts. Since highway taxes are imposed to reimburse the state for highway wear and tear, which is most directly attributable to the level of highway use, a tax that levies a higher effective per-mile tax rate on out-of-state trucks plainly discriminates against interstate commerce.

The Pennsylvania Supreme Court recognized the inevitable discriminatory consequences associated with a flat tax when interstate truckers use a state's facilities less than local truckers. Nevertheless, the Court upheld that discrimination, reasoning that "[i]nterstate

motor carriers are free to use the Commonwealth's highways as often and for whatever distances they wish and cannot be heard to complain that because they choose to use those highways less frequently than motor carriers whose vehicles are registered in Pennsylvania may use them, the burden of the flat fee falls too heavily upon them" (J.S. App. 28a) (emphasis in original).

Such reasoning plainly ignores the realities of the interstate trucking business. Because of the nationwide scope of its business, the pressures of vigorous competition, and the demands of shippers, an interstate motor carrier has little or no control over the extent of its use of a particular state's highways. To postulate otherwise disregards the practical economic realities of the businesses subject to taxation and, consequently, the practical effects of the tax on those businesses. Such a

refusal to examine the practical effects of a challenged state tax is directly contrary to this Court's decisions. See Nippert v. Richmond, 327 U.S. 416, 431 (1946); Halliburton Oil Well Cementing Company v. Reily, 373 U.S. 64, 69 (1963); Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 37 (1980).

The practical effect of the axle tax and marker fee is a per-mile discrimination that places truckers based in the amici states at a substantial disadvantage in competing with Pennsylvania-based truckers. That competitive handicap is initially reflected in North Carolina trucks' experiencing higher costs than locally-based competitors whenever they travel through Pennsylvania. Those higher costs depress profits and make it harder for interstate carriers located in the amici states to operate successfully in the highly competitive trucking industry. When its

domestic trucking industry suffers, the overall economies of the amici states also suffer, thereby harming other interstate industries that rely on a healthy interstate trucking industry.

2. Non-Proportional Taxes Like Pennsylvania's Axle Tax and Marker Fee Impose a Cumulative Burden on Interstate Commerce.

Flat, non-mileage proportioned taxation of interstate trucking has recently spread from Pennsylvania and Arkansas to five other states. Indiana ($50 per truck), Kentucky ($150 to $200 per truck), Maryland ($25 per truck), New Jersey ($25 per truck), and Vermont ($50 per truck) all impose taxes that, while facially neutral, impose higher effective tax costs per mile on out-of-state trucks than in-state trucks. As a result, truckers based in the amici states face a growing cumulative tax burden totally unrelated to the extent of

their use of the various states' highways. If this Court upholds the Pennsylvania taxes, similar taxes will surely be adopted by still more states, with a spiraling deleterious effect on the free flow of interstate commerce. See Armco, Inc. v. Hardesty, 467 U.S. 638, 644 (1984).

C. The Amici and Most Other States Finance Highway Construction Through Non-Discriminatory Highway Taxes.

Amici North Carolina and Utah recognize every state's right to assess and collect sufficient highway taxes to build and maintain its highway system. Amici do not question the amount of the highway taxes imposed by either Pennsylvania or Arkansas or any state levying a non-proportional tax. Amici disagree only with the discriminatory form of the challenged taxes. Both Arkansas and Pennsylvania have designed their taxes to protect local interests at

the expense of those who have no voting representation within the state.

Pennsylvania defends the discriminatory impact of its taxes as a necessary evil caused by purported administrative difficulties associated with other more equitable, mileage-related forms of highway taxation (Pennsylvania Motion to Dismiss or Affirm at 21-22). Such a rationalization has no basis in fact. Amici and most other states recoup their highway costs through the two-tiered, non-discriminatory, mileage-related tax system described herein (supra at 6-7). Amici North Carolina and Utah charge an annual truck registration fee that, under the IRP, is apportioned to the truck's miles traveled in their state. Supra at 6. Additionally, amici impose a tax on all motor fuel purchased in their state, and on all motor fuel purchased elsewhere but used in their state. Both the fuel purchase tax and the fuel use tax are

directly related to each truck's actual miles traveled in the state. Supra at 7.

North Carolina and Utah experience no administrative difficulties in implementing their highway tax system. Pennsylvania and Arkansas, in fact, have in place the same two kinds of mileage-related taxes, and need only increase the rates of those taxes if additional revenue is required. Since such non-discriminatory alternatives are readily available, it is clear that Pennsylvania and Arkansas could satisfy their highway tax needs in a non-discriminatory and far less burdensome manner. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

CONCLUSION

For all of the above reasons, the decision of the Pennsylvania Supreme Court should be reversed, and the Pennsylvania axle tax and marker fee should be declared invalid under the Commerce Clause.

Respectfully submitted,

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